

MINUTES
PUBLIC SAFETY COMMITTEE

March 4, 2015

A meeting of the Public Safety Committee of the County of Kaua'i, State of Hawai'i, was called to order by Gary L. Hooser, Chair, at the Council Chambers, 4396 Rice Street, Suite 201, Līhu'e, Kaua'i, on Wednesday, March 4, 2015, at 9:41 a.m., after which the following members answered the call of the roll:

Honorable Mason K. Chock
Honorable Ross Kagawa
Honorable JoAnn A. Yukimura
Honorable Gary L. Hooser
Honorable Arryl Kaneshiro, Ex-Officio Member
Honorable Mel Rapozo, Ex-Officio Member

Excused: Honorable KipuKai Kuali'i

The Committee proceeded on its agenda item, as follows:

Bill No. 2573, Draft 1 A BILL FOR AN ORDINANCE TO ESTABLISH A
NEW ARTICLE UNDER CHAPTER 22, KAUAI
COUNTY CODE 1987, AS AMENDED, RELATING
TO DECLARING A PUBLIC NUISANCE
(This item was Deferred.)

Committee Chair Hooser: What we are going to do is we have other consultants on another issue coming in, so the intent is to defer discussion on this issue or to move it. Unfortunately, it is going to be after lunch. It will probably be around 2:00 p.m. We do have again, consultants coming in, flying in special for this other item. I want to apologize to anyone that is here. There will be some amendments proposed at that time, I believe. If anyone who cannot or does not want to come back, you are welcome to testify now and take your time. Yes, Councilmember Kagawa.

Councilmember Kagawa: I have a process question. My first thought is why after 2:00 p.m.? Do we expect the Planning item to take up three (3) hours?

Committee Chair Hooser: We expect that the Planning item will take at least two (2) hours, there is lunch, and there is a 1:30 p.m. presentation that we have already scheduled.

Councilmember Kagawa: My second process question is that if the plan is to defer because we need more work, then why do we not just defer and do the work? In the prior Committee Meeting we spent three (3) hours or four (4) hours on it already. To me, we are kicking it down the road and just prolonging something that really, if we are going to defer it anyway, then just do the work two (2) weeks from now. Thank you.

Committee Chair Hooser: I believe we will have at least one (1) amendment proposed that if the majority of the Committee supports that

amendment, it may be sufficient to move it to the full Council. That is my belief. Because of the laws that we work under, we have not been able to discuss those amendments, but it is my understanding that there will be an amendment introduced and that we are not kicking it down the road.

Councilmember Kagawa: Oh, you did not mean to defer the Bill to an other Committee Meeting...

Committee Chair Hooser: No, just on the agenda.

Councilmember Kagawa: Just push it back?

Committee Chair Hooser: Just to 2:00 p.m.

Council Chair Rapozo: Basically recess until after the Planning item.

Committee Chair Hooser: Right.

Councilmember Kagawa: Oh, okay. I thought you meant work on it and then defer it two (2) weeks from now, which to me, does not make sense.

Committee Chair Hooser: No. I apologize. I used the word "defer." I meant move it on the agenda.

Councilmember Kagawa: Okay.

Committee Chair Hooser: However given that, we will not know until we look at the amendments that are offered whether or not we need to defer it again. So, it might be a possibility but I am hopeful we can reach some agreement this afternoon.

Councilmember Kagawa: Okay.

Council Chair Rapozo: I apologize because I had informed Mr. Kagawa on the break that it was going to be deferred.

Committee Chair Hooser: That might be a possibility.

Council Chair Rapozo: It was only after I spoke to him that I spoke to you that there is a possibility that we could move it out today.

Committee Chair Hooser: Right.

Council Chair Rapozo: Thank you.

Committee Chair Hooser: Okay. I can suspend the rules if anyone would like to testify at this time or otherwise you are welcome to come back. Would anyone like to testify? Please come forward.

There being no objections, the rules were suspended to take public testimony.

GLENN MICKENS: For the record, Glenn Mickens. Thank you, Gary. Our testimony, one from Walter Lewis, and I concur with this one thousand percent (1,000%). If it is not going to come up until after lunch and you are going to

offer more amendments to this Bill, is that what you were saying, Gary? There is going to be more amendments offered to this thing other than what you have now?

Committee Chair Hooser: We will not know until we come back, but it is my understanding that there will likely be amendments offered.

Mr. Mickens: Okay. The testimony I have, you have a copy of it, I believe. The testimony I have is with the way that the amendment happens to be that I think JoAnn and you offered prior to this time. Take that into consideration. If you offer more amendments later on and it changes to something else. Anyway, you have a copy of this. The purpose of this testimony is to assume that Bill No. 2573 will be amended to read as proposed in the floor amendment introduced on January 18, 2015 by Councilmember Yukimura. In my view, the proposed ordinance is defective in several important aspects. The bill proposes to establish as a public nuisance a circumstance that is not as public nuisance laws should be a matter of concern to the general public. The health of the vast majority of people is not affected in any significant way by the occasional emanation of smoke particles from a residential fireplace. It is rare on Kaua'i that any fireplace would be in regular use at any time of the year. It would be rarer if any person enjoying a residential fireplace by using it would do so with the intent to cause injury to the health of any other person though I know there is circumstances that would, but that is rare. If the purpose of the bill is to safeguard the health of the small number of persons who are susceptible to the effect of air pollutants, the bill is fundamentally inept. It only covers smoke emanations from fireplaces in residences which happen to be located on land that is zone R4 or higher and no other pollutants. It thus fails to regulate smoke arising from any other building or from any other source. The number of residences on Kaua'i that have wood burning fireplaces is modest. Those who have them complied in good faith with the applicable building codes and incurred considerable cost, directly or indirectly, for their construction. The proposed ordinance would place in peril of legal consequences the use of these fireplaces. In a very real sense, adoption of the proposed ordinance would be a taking of property without just compensation. Although the bill goes to considerable length to claim that air pollutants can travel great distances, thirty (30) miles is mentioned in likely practice, the ordinance would be used in disputes between neighbors and not some distant source. It seems that...

Committee Chair Hooser: That would be your three (3) minutes, Mr. Mickens.

Mr. Mickens: I only have two (2) more sentences.

Committee Chair Hooser: Go ahead.

Mr. Mickens: Thank you. It seems to me likely that except in vendetta settings a person claiming damage would have a formidable task of showing intentional or even reckless purpose to harm was intended by a resident using his fireplace. In cases of vendettas, other remedies would be available. The bill is not effectively written. It would be of extremely limited impact and it would be very awkward to enforce. I urge the Council to reject it.

Committee Chair Hooser: Thank you very much.

Mr. Mickens: Thank you for the...

Committee Chair Hooser: Thank you very much. I should have known they would be long sentences.

Mr. Mickens: Thank you for the time. Obviously, Walter...

Committee Chair Hooser: Thank you. Thank you very much.

Mr. Mickens: Okay.

Committee Chair Hooser: Anyone else here would like to speak at this time?

There being no further testimony, the meeting was called back to order, and proceeded as follows:

Committee Chair Hooser: We are in recess until 2:00 p.m. Thank you.

There being no objections, the Committee recessed at 9:53 a.m., to convene in the Planning Committee.

The meeting reconvened at 2:04 p.m., and proceeded as follows:

Committee Chair Hooser: We are on Bill No. 2573, Draft 1 – A Bill For An Ordinance To Establish A New Article Under Chapter 22, Kaua'i County Code 1987, As Amended, Relating To Declaring A Public Nuisance. I am going to ask for public testimony.

There being no objections, the rules were suspended to take public testimony.

Committee Chair Hooser: Would anyone here in the public like to speak on this issue?

ALLISON S. ARAKAKI, Council Services Assistant I: We have one (1) registered speaker, Ben Kuhaulua.

Committee Chair Hooser: If you could come forward please.

BEN KUHAULUA: Aloha.

Committee Chair Hooser: Aloha.

Mr. Kuhaulua: My name is Ben Kuhaulua for the record. I am kind of confused right now. I thought you folks were going to have somebody to talk about the Bill or more questions with other people that was supposed to come. Was that right or wrong? Were you going to have more people coming to talk about this or help you folks decide?

Committee Chair Hooser: No.

Mr. Kuhaulua: Oh, okay.

Committee Chair Hooser: What is going to happen is we are going to take public testimony, then I believe some of the Councilmembers might want to amend the Bill further, and then we are going to discuss that amendment.

Mr. Kuhaulua: Okay. Maybe I should just listen up and hear what you folks have to say before I say anything because it is a learning process for me.

Committee Chair Hooser: Yes, okay.

Mr. Kuhaulua: If you folks are going to ask to come back again.

Committee Chair Hooser: Yes, I would be happy to.

Mr. Kuhaulua: Okay. Thank you.

Committee Chair Hooser: Thank you. Yes? Anybody else would like to testify? If you could introduce yourself for the record and then proceed.

LORI ABBEY MACDONALD: I am Lori Abbey MacDonald. Hi. I wrote everything down. It is, *aloha* Council. I am begging you to please help us and anybody else that lives a neighborhood with wood burning fireplaces that have health issues. I tried to call the County Attorney about the Temporary Restraining Order (TRO). I have two (2) of them that were denied, not this year but the year before and the year before that. It was just strictly wood burning. I had to use an inhaler this morning as the fireplace was gross. If that was fresh dry wood, then I am Mary Poppins. Other people would probably like to testify but they cannot be here or either they are too ashamed to come. I do not know why. There was a woman on our neighborhood who has Chronic Obstructive Pulmonary Disease (COPD). She has never smoked cigarettes but she cannot stand the smoke, but yet she will not come and testify. Smoke is bad, it is deadly, and anybody that is pregnant, diabetic, infants, young children, older, or anybody with heart or lung disease are in trouble. That is my husband and myself. The Department of Health (DOH) goal is to promote health and well-being and protect and enhance air quality which has not happened. Is this considered a public nuisance? Can we file a police report or who do we call? I am not talking about barbeques, *imu*, et cetera. I am just talking about wood burning fireplaces. The solution in neighborhoods that are so close-knit, and I am not talking about Kōke'e or where you live on acres, I am talking about close-knit neighborhoods, would be to change to gas or electric fireplaces. Did you folks watch the compact disc (CD) that I gave last time? Did you look at Kanani's pictures of what she sent in? Is it possible to get the minutes from today's meeting and the other two (2) meetings that were on this? I have things that I would like for you folks to take copies of just so that you can read more about the dangers about wood burning fireplaces. That is it.

Committee Chair Hooser: Thank you very much for your testimony. The minutes are available and we can give you instructions on how to get those.

Ms. MacDonald: Okay.

Councilmember Yukimura: I have a question.

Committee Chair Hooser: Oh, okay. We have one (1) question or we have questions.

Ms. MacDonald: Okay.

Councilmember Yukimura:
a Temporary Restraining Order?

Lori, you said there were two (2) efforts to get

Ms. MacDonald:

Yes, I have them right here.

Councilmember Yukimura:

Are you saying that you went to court?

Ms. MacDonald:
was denied.

No, I went and filed a restraining order and it

Councilmember Yukimura:

But where did you file for a restraining order?

Ms. MacDonald:

At the court.

Councilmember Yukimura:

Okay. You did try the judicial route.

Ms. MacDonald:

Yes.

(Councilmember Kaneshiro was noted as present at 2:10 p.m.)

Ms. MacDonald:

But this was back in 2012 and 2013.

Councilmember Yukimura:

Did you have an attorney representing you?

Ms. MacDonald:

No.

Councilmember Yukimura:
whatever you have.

Okay. Yes, I would like to get copies of

Ms. MacDonald:

Okay. Do you want copies of these?

Councilmember Yukimura:

Yes. Our staff can make copies.

Ms. MacDonald:
wood smoke produces.

She just took a bunch of things that is what

Councilmember Yukimura:

No. I want to see...

Ms. MacDonald:

But you want copies of...

Councilmember Yukimura:
the applications.

If you made an application, I would like to see

Ms. MacDonald:

Okay.

Councilmember Yukimura:

And the resulting court decision.

Ms. MacDonald:

Well, they just stamped "denied" on it.

Councilmember Yukimura:

Okay.

Ms. MacDonald:
a problem? This morning it was unbearable. I had to leave all of my windows shut and the air purifier is on because my animals are at home. Who do we call? That is

what I want to know. It is killing me to have to use the inhaler all of the time. Neil is an avid bicycle rider and he has been really sick. He is going to the Pulmonologist next Wednesday because he has asthma and has trouble. It is ridiculous.

Councilmember Kaneshiro: Since the last time you were up here, have you looked into a private nuisance lawsuit?

Ms. MacDonald: No, and that is what I wanted to know. I know one of my friends did look into it, but we have not spoken with the attorney yet. I just believe that is ridiculous that we should have to hire a lawyer when it should be our right to be able to breathe clean air in neighborhoods. Now if we lived out on acres, fine. I do not care what anybody does or if we lived in Kōke'e, I would not care because the smoke comes up. Today, I took a picture of the smoke. It was gross.

Committee Chair Hooser: Maybe you could send the picture to...

Ms. MacDonald: I do not know how to.

Committee Chair Hooser: Okay. We can figure out how to get the picture. Any other questions? No other questions. Thank you very much.

Council Chair Rapozo: I have one (1).

Committee Chair Hooser: Chair.

Council Chair Rapozo: It is really a continuation of Councilmember Yukimura's question about the denial of the restraining order. Was there a reason given?

Ms. MacDonald: No, they just wrote "denied."

Council Chair Rapozo: You applied for the TRO and it never...

Ms. MacDonald: Two (2) of them.

Council Chair Rapozo: It never made it passed the first review of the Judge?

Ms. MacDonald: The Judge denied it. I also called the attorney that was here last time because he said to do a TRO. I knew I had two (2) denied ones and he never returned my call. I am beginning to feel like it is not just my problem. Other people on Kaua'i have the same problems and fireplaces are popping up all over. It is sickening that people have to be exposed to this and get ill.

Council Chair Rapozo: Oh, okay. It was a restraining order against harassment versus...

Ms. MacDonald: It was not harassment.

Council Chair Rapozo: Well, that is what you filed.

Ms. MacDonald: It was against the fireplace.

Council Chair Rapozo: I think that is why it is important in cases like this. I understand attorneys cost money and I am not an attorney, but I do know that the restraining order to protect someone from harassment is very difficult to get in court and that is what you filed. I think that is obviously why the Judge denied it. Maybe consulting with an attorney would help as far as getting some immediate...

Ms. MacDonald: But what about the other people on Kaua'i that are suffering?

Council Chair Rapozo: I do not know about the other people, ma'am. I am just explaining to you that if you are in fact looking for immediate...let me just say that should this Bill pass and it becomes a law, the burden of proof to find this person guilty is substantial. It is beyond a reasonable doubt versus in a Civil Court where it is...

Ms. MacDonald: Even pictures?

Council Chair Rapozo: Yes.

Committee Chair Hooser: Rather than have the dialogue between the two (2) of you, if we could see if there are any other questions and then move forward with the discussion. Any other questions? Thank you. Thank you, Ms. MacDonald. Anyone else would like to speak?

There being no further testimony, the meeting was called back to order, and proceeded as follows:

Committee Chair Hooser: We need a motion to approve or does that motion carryover from the last time?

Councilmember Yukimura: No, we need a motion.

Councilmember Yukimura moved to approve Bill No. 2573, Draft 1.

Councilmember Hooser: Is there a second for discussion purposes?

Councilmember Chock seconded the motion.

Committee Chair Hooser: It has been moved and seconded. I understood there might be some proposed amendments. Can we get them proposed?

Councilmember Yukimura: I think you can take your seat.

Committee Chair Hooser: Yes. I am sorry. Do you want to move to amend?

Councilmember Yukimura: Yes, okay.

Councilmember Yukimura moved to amend Bill No. 2573, Draft 1 as circulated, as shown in the Floor Amendment which is attached hereto as Attachment 1, seconded by Councilmember Chock.

Councilmember Yukimura: Thank you.

Committee Chair Hooser: It is moved and seconded to amend, and it is being circulated now. Thank you. Councilmember Yukimura, you have the floor.

Councilmember Yukimura: Thank you. This amendment does not give all the relief that can be given or that is desired by the families that are being affected. It greatly simplifies the proof and it brings some relief. My amendment would remove from the present Bill No. 2573, Draft 1, the requirement for showing injury to the health of any person and it just requires the showing of an operating fireplace during periods of "no-burn" based on the Director of Health's decisions. It applies only to fireplaces or other smoke-generating indoor heating devices. All one would have to do is show that the fireplace is in operation because this would be prohibited during times of no-burn declaration. It is a limited period. I think last year there were thirty (30) days that were no-burn days, but I have been told by the families that even that would help and there is already been a finding that it is very bad atmospheric conditions that do not allow burning of any sort under Department of Health regulations. There is a very clear definition of when the burning is not allowed. All you would have to do is show that burning is occurring which to me, addresses the issues of proof and prosecution although we can wait to hear from the Prosecuting Attorney who is in the audience. As you can see, it is just a partial solution, but it is a start and the families tell me that it will help. I feel like the issue of proof has been simplified, but we will see. This is a proposal, an effort to address what I believe is a problem without affecting culture or tradition or regular outdoor cooking and trying to address this health issue that is affecting certain families.

Committee Chair Hooser: Councilmember Chock.

Councilmember Chock: I too, want to hear from our Prosecuting Attorney on his opinion of this which actually greatly changed the scope of the bill, but also to confirm that this no-burn period would only apply to R4 or higher density. Is that correct? So, it would not apply to anyone in Kōke'e or anyone like was said earlier, in acreage, during that time in a close-knit neighborhood on no-burn days? If it was proven that they were burning, then the fine might be assessed. Is that correct?

Councilmember Yukimura: That is correct.

Councilmember Chock: What is meant by "other smoke-generating indoor heating devices?" That is a little bit...I am unsure what that amounts to in the end.

Councilmember Yukimura: It would be like stoves, I guess, that are not fireplaces. They have enclosed wood burning stoves now.

Councilmember Chock: In the house?

Councilmember Yukimura: Yes.

Councilmember Chock: Okay. I am still not sure, but thank you for your answer.

Councilmember Yukimura: Yes.

Committee Chair Hooser: Any other questions? Councilmember Kagawa.

Councilmember Kagawa: I just wanted to ask Councilmember Yukimura if she had checked with the Police or Prosecuting Attorney's Office about whether this amendment would be something that is enforceable or recommended to solve this problem.

Councilmember Yukimura: I have not. We were doing research on Environmental Protection Agency (EPA) certified stoves and everything and completed our work last...well, actually yesterday. So, I have not. If we can defer the matter and I can do that between the next meeting and now.

Councilmember Kagawa: I think while the Prosecutor is here we can hear from him. Certainly if the Prosecutor gives his okay, I would also need to hear from the Police. I do not know if we have to call them again. So far, their answers have been the same with every amendment that we have done. I just want to make sure that if we pass a bill, that it is enforceable and it will solve the problem, not create more problems. Thank you.

Councilmember Yukimura: I agree with that goal and agree that unless the enforcement agencies can say that it is a fairly easy thing to enforce, it would be a problem.

Committee Chair Hooser: Yes, it seems like this has come a long way in terms of enforceability in a positive direction, but we will let the Prosecutor speak to that. Councilmember Chock.

Councilmember Chock: No thank you.

Committee Chair Hooser: Council Chair.

Council Chair Rapozo: I have a question and I am not sure if Councilmember Yukimura can answer it or someone. What triggers a no-burn day? What needs to occur before the Department of Health creates a no-burn day?

Councilmember Yukimura: I know that Jenelle helped me look at the rules. I do not have it in front of me, but if I recall, there were two (2) atmospheric conditions that the Director of Health would look at. It can be triggered by fog or I think low atmospheric conditions where there is an inversion of sort that keeps the smoke and other things. Thank you. I will read this. This is Rule 11-60.1-55(a)1. Under the following conditions, this is no-burn conditions. "When the director determines that meteorological conditions have resulted in widespread haze on any island or in any district on the island and that these meteorological conditions will continue or deteriorate. For the purposes of this section, widespread haze shall be considered to exist when all visible ridges: (A) Within five to ten miles have a "smoky" or bluish appearance and colors are subdued; and (B) Beyond ten miles have a blurred appearance; or (2) When a "no-burn" period has been declared in a district and smoke from any adjacent district, as determined by the director, may impact on the affected district..." So, that is their way of determining no-burn days. As Mr. Noland Hirai explained, he came before us from the Department of Health in our last Committee Meeting, it is related to health conditions. That is why the Department of Health has developed these rules to protect health under these conditions.

Council Chair Rapozo: And it does not apply to fireplaces in the State's law?

Councilmember Yukimura: That is correct. Nothing in their rules applies to fireplaces. Fireplaces are just completely exempt.

Council Chair Rapozo: Right. I guess if Mr. Hirai says that smoke is a hazard, then why would it not lobby to remove the exemptions? I mean, really, it is just a...

Councilmember Yukimura: Oh, yes, which is why I asked them on the floor "Why could you not amend your rules?" He did not give a very clear answer to my satisfaction. He did say that their rules would apply Statewide and I do not know what all the complications would be Statewide. That is one reason where perhaps trying it at a local level might be useful to see how it works.

Council Chair Rapozo: And potentially put the County in litigation from a fireplace owner.

Committee Chair Hooser: If I could add. It was requested in writing to consider amending the rules for this very thing and the Department of Health declined to do so. They said the County has the authority. They said in writing "The County has the authority to deal with this issue." It is no question in terms of their perspective that the County has the authority to do this. They were asked to amend the rules and they declined to do so. Councilmember Kaneshiro.

Councilmember Kaneshiro: Sorry. To get back to what Councilmember Chock said, I am still not clear on this "other smoke-generating indoor heating devices." I am not sure what the zoning is in Pākalā, but I know a lot of them have water heating. They burn the fire outside to heat the water heater. Would that be considered smoke-generating from an indoor heating device?

Councilmember Yukimura: No. The device would have to be inside.

Councilmember Kaneshiro: So, it is a fire inside the house that they are doing?

Councilmember Yukimura: Yes, and there are stoves that burn wood. You see them in Kōke'e too sometimes and they are safer than fireplaces. I think I read from EPA, seventy-three percent (73%) of house fires are due to fireplaces. Some crazy thing like that. So, there are these indoor devices also. I mean, I thought about allowing no-burning except from EPA certified indoor devices because they tend to be cleaner, but I think this would suffice as long as there is something coming out of the chimney from within the house and it is burning wood or it is generating smoke, that would be the event. If this body feels that we should just deal with fireplaces, we can do that too. I am willing to just start there maybe and take out the "or other smoke-generating indoor heating devices." We can start really small with just fireplaces if that makes everybody feel more comfortable. This tries to address the issue of enforcement. I mean, there have been several issues that were immediately placed before us by the public, right? One was affecting cultural practices and traditions, and unnecessarily restricting people's activities. So, that was one. I think our previous amendment tried to address that. The other was enforceability, how you are going to prove health, who has the expertise, and all of that. This is an effort to address the enforceability issue. I am thinking, I may be wrong, but I am thinking all you have to show is that there is smoke coming out of the chimney on a no-burn day. No-burn day is very easy to...I mean, it is an official act that has been in place. Nobody has questioned the validity of no-burn days that I know. I think it is backed

up by EPA and the issue of clean air. All you have to check is was it a no-burn day and was there burning going on. To me, it tries to simplify the proof.

Committee Chair Hooser: I just want to thank Councilmember Yukimura for the work on this. We will ask the Prosecutor to talk about this. The complexity of the issue is greatly reduced. No-burn days are documented and official. Smoke coming out. You can visually see the smoke. It is a no-burn day. I would imagine the person would be warned. There is a complaint, they go out and say, "Hey, it is a no-burn day" or cite them, and then they would quickly learn that they cannot burn on no-burn days. The fact that is limited to R4 or denser puts it in neighborhoods where it deserves to be regulated where people live close together. It is still very low. It is a violation. It is not a criminal act. So, it has come a long way in terms of where it started from. If there are no other questions, we will ask the Prosecutor to come up and let us know what he thinks. I will suspend the rules and invite the Prosecutor.

There being no objections, the rules were suspended.

Committee Chair Hooser: Thank you very much for your patience and for your involvement. I know you are a busy guy.

JUSTIN F. KOLLAR, County Prosecuting Attorney: No trouble whatsoever. For the record, Justin Kollar, Prosecuting Attorney. Having had the opportunity to review the proposed floor amendment, there are a few things that jumped out at me as potentially being areas of concern or areas of question. The first one that jumps out to me is showing that the person who did the burning knew that it was a no-burn day and did the burning anyway. I am not sure how DOH notifies people that it is a no-burn day. I know sometimes you hear a Public Service Announcement (PSA) on the radio or you hear something on the news that it is a no-burn day, something in the paper. I am a little concerned that we would have to show that the person knew that it was a no-burn day and there is no real formalized way that Department of Health notifies people that today is a no-burn day that would be widely disseminated such that you could assume that everybody knows whether it is a no-burn day or not. So, that jumps out at me as a concern.

The second question that comes up when I read this is the provision in Article B where it talks about how this does not apply to "cooking activities and other traditional and customary practices." I think an argument could be made that keeping warm in one's house using a fireplace is a traditional and customary practice, at least for the use of a fireplace and that by singling that use out while allowing other uses to...you can still do your *hibachi* or *imu*. You can still do other things that produce smoke and emit it into the air. I think you run the risk of having a successful challenge mounted on a basis that there is no rationale reason for singling out this one purpose versus all of these other smoke-generating things that you can still do on a no-burn day. I truly admire the lengths to which folks have gone to try to kind of get this into some kind of manageable shape to address the problem that they are having up there, but I think at this point, this ordinance that is here in the proposed amendment is really just kind of very tenuously at this point connected to the original problem that brought us all here. I really question whether it is going to have any impact on addressing the situation. To me, the question of what you can do on a no-burn day since that is something that is governed by DOH Administrative Rules, this is an issue that should probably also be addressed in the State DOH rules. I think this is another one of those situations where we are perhaps treading in the *kuleana* of the State unfortunately. So, those are my thoughts on looking at this.

Committee Chair Hooser: Thank you for your thoughts. Councilmember Yukimura.

Councilmember Yukimura: The knowing of a no-burn day can be...well, I will ask you. Can it be satisfied by having it posted on a website?

Mr. Kollar: But not everyone has internet access at home.

Councilmember Yukimura: Well, if you show they have internet access.

Mr. Kollar: I am not sure how I would do that.

Councilmember Yukimura: Ask. Do a search.

Mr. Kollar: Oh, sure. I mean, if they consent and say, "Oh, yes come in and look at my computer. I have the DOH web page right here." Yes, okay, but I think that is...

Councilmember Yukimura: I mean, does one not have a responsibility to know that it is a no-burn day? Is it really we have to show affirmatively that they know that it is a no-burn day?

Mr. Kollar: I think in order to prove the state of mind, this is a penal offense that we are talking about. We have to go in and show that yes, it was a no-burn day, it was a validly declared no-burn day. I am not sure how we do that. Maybe we have to bring somebody in from the...

Councilmember Yukimura: Oh, we can show that it is a no-burn day.

Mr. Kollar: ...DOH.

Councilmember Yukimura: That should never be a problem.

Mr. Kollar: It should not be a problem, but you are making assumptions as to what a Judge requires to prove something. We cannot just go in and say, "Judge, everybody knows that was a no-burn day."

Councilmember Yukimura: No of course not. We would get an official declaration from the Department of Health that it was a no-burn day. The question is...

Mr. Kollar: But is the Department of Health going to provide us...

Committee Chair Hooser: If you could let the Councilmember finish her question. I want to settle the conversation down. I would like to settle the conversation down a little bit.

Mr. Kollar: Sure.

Committee Chair Hooser: And if both of you could take a breath and let each other finish their statements, I think that would be good. I mean, we have burn days now that are enforced in other areas. Go ahead Councilmember.

Councilmember Yukimura: I am just needing to know what extent of proof would be necessary to show that there was a no-burn day in effect. I mean, someone can go through all kinds of ways to avoid showing that they know it is a no-burn day, but in terms of the level of proof that a Judge would require, I mean, it seems like for the application of no-burn day in terms of the Department of Health's regulations and the enforcement thereof. Is it not pretty much, it is a no-burn day, you are burning, and that is not good?

Mr. Kollar: That is the theory here, yes.

Councilmember Yukimura: Alright.

Mr. Kollar: I get that.

Councilmember Yukimura: Okay.

Mr. Kollar: But when you go into court, an element of the offense is that it occurred during a period which the State Director of Health has declared a no-burn period.

Councilmember Yukimura: Okay.

Mr. Kollar: Which means we have to prove to the Judge that the Department of Health declared a no-burn period. As to how we do that, we would either have to get some sort of certified affidavit from the Department of Health...

Councilmember Yukimura: Yes, right.

Mr. Kollar: ...from the Director. I do not if they provide those kinds of affidavits or do those kinds of things or bring in somebody from the Department of Health to testify...

Councilmember Yukimura: Yes.

Mr. Kollar: ...that it was a no-burn period.

Councilmember Yukimura: Okay.

Mr. Kollar: I mean, it may seem like a very simple thing, but we deal with these things everyday so we know that what may seem obvious is not necessarily obvious.

Councilmember Yukimura: But you will do your best to enforce the law?

Mr. Kollar: We always...that is our oath. Of course.

Councilmember Yukimura: Right. Okay. I do not understand what the problem is with the no-burn day part.

Mr. Kollar: Because we have to prove that it is a no-burn day. So, we have to get whatever records we have to get from the Department of Health.

Councilmember Yukimura: Okay.

Mr. Kollar: Okay. That takes time. We have to go to Honolulu. I do not know if we can get them from here. I do not know if that research has been done as to whether they provide those kinds of...

Committee Chair Hooser: If I could interject for a second. I believe...

Mr. Kollar: Can I finish my answer?

Committee Chair Hooser: No. I would like to interject for a second.

Mr. Kollar: Oh, okay.

Committee Chair Hooser: I just want to help things along. I believe they are posted. I believe the Department of Health posts these on their website. Would that be sufficient if that happened?

Mr. Kollar: No. There is no way to bring a website into the court and show that.

Committee Chair Hooser: Okay.

Mr. Kollar: Yes.

Committee Chair Hooser: Thank you very much.

Council Chair Rapozo: I have a real quick...

Councilmember Yukimura: I...

Committee Chair Hooser: Can I call a recess for second, please?

Council Chair Rapozo: Oh, yes. You are the Chair.

Councilmember Hooser: I will call a five (5) minutes recess. Hit the gavel for me, please.

There being no objections, the Committee recessed at 2:38 p.m.

The meeting reconvened at 2:44 p.m., and proceeded as follows:

Committee Chair Hooser: Alright, let us try this again. That was a nice break. It allowed us to gather our thoughts a little bit, I think. Where were we?

Councilmember Yukimura: I know where we were.

Committee Chair Hooser: Councilmember Yukimura, you have the floor.

Councilmember Yukimura: Okay. During the break the Prosecutor clarified for me that this knowing of knowing that is a no-burn day has two (2) parts. One is that there was actually a no-burn day. It was an official no-burn day. If there is a stickler for a Judge, the Prosecutor may have to bring in a Department of Health

Director or somebody to swear under the oath that it was a no-burn day. It can be done. The second part is more difficult, proving the state of mind of the homeowner that is burning in the fireplace. I posed a scenario which I would like to pose now publicly. If a police officer goes up and has checked on the website or called the Department of Health and established in the police officer's mind that it is no-burn day, he knocks on the door and says, "It is a no-burn day. Your chimney is showing that your fireplace is on, and you are in violation unless you turn it off." Then you can use that to prove a state of mind, right?

Mr. Kollar: It would be evidence.

Councilmember Yukimura: Okay.

Mr. Kollar: It is never wise to make pronouncements based on hypotheticals. It would be evidence. I would analogize this to a driving without a license case. If a police officer pulls someone over, they go and they have the dispatcher run a check on the license, it comes back no license, the officer issues the citation, and the person has to come to court. It is not enough for us to put the officer on and have the officer testify "Oh, I checked and the person did not have a license." We still have to bring the person in from Motor Vehicle Licensing to testify that "I consulted the records, it is my job to consult and interpret these records, I interpreted them, and on this day this person with this birth date did not have a license." You could certainly try to make the argument that the officer told the person it was a no-burn day and the person persisted in their course of burning their fireplace, but I am not persuaded that would prove beyond a reasonable doubt in a court of law, be sufficient to prove notice. I think for any common sense, application of that term yes. If the cops come to my door saying, "Hey, it is a no-burn day. Stop." I am going to take the cops word for it, but it is a slightly different standard when we go into court and we are looking to get convictions or guilty verdicts. That is my best way of analogizing that situation.

Councilmember Yukimura: Okay. If it is going to be so impossible to prove this, then I do not know how you prove anything else in court. You prove a lot more complex cases, murder cases, all of those things. I am guessing this might take some time and it may seem onerous to the Prosecuting Attorney's Office, but if it passes as a law and it is your job to enforce the law, you will do it to the best of your ability. If we find that the courts do not find sufficient proof, then we have to retool this law. I do not know how exactly, but I mean, there has to be some bottom line reasonableness in what evidence is allowed and used.

I would like to move to the next concern that you expressed which was this Article shall apply to fireplaces or other smoke-generating indoor heating devices within residents, but shall not apply to cooking activities and other traditional and customary practices, including but not limited to use of *imu*, *hibachi*, or preparation of "smoke meat"; agricultural operations; religious activities, such as burning of incense. So, you were opining that this would not stand up as a rational basis?

Mr. Kollar: Well, it leaps out as a concern that you are singling out a particular type of conduct and allowing other types of similar conduct without articulating really the basis for singling out this one (1) particular type of conduct.

Councilmember Yukimura: Well, it is very simple. The Department of Health regulations do not include it. I think they do include agricultural burning and

other kinds of burnings, but we are not trying to do that in our law because it is covered somewhere else and fireplaces are explicitly excluded from the Department of Health's regulation. So, that would be the rationale.

Mr. Kollar: However, we are still allowing other types of activity that generates smoke from the residential unit including *hibachi*, food preparation, and those sorts of things.

Councilmember Yukimura: I think that is a policy decision that can be made to give exception to a cultural practice that is indigenous to Hawai'i versus some other mainland cultural practice that may not be as appropriate.

Mr. Kollar: Well, who is making the determination as to what is appropriate though?

Councilmember Yukimura: The policy body that is passing the law.

Mr. Kollar: That is fine and that is what this Council does, it make policy decisions as far as the County goes. I am concerned that singling out a particular type of conduct and allowing other similar types of conduct is going to lead a Judge to find that this law is not supportive on any rational basis to what you are trying to prevent. So, that is just a concern that jumps out at me. I am not your legal advisor. That is just my position on where I see things.

Councilmember Yukimura: In terms of enforcement and in terms of showing it is a no-burn day and showing that the fireplace on, is there any problem?

Mr. Kollar: I am not sure. What was the question there?

Councilmember Yukimura: In terms of these two (2) elements of proof, showing that it is a no-burn day and showing that a fireplace is on, is there any problem?

Mr. Kollar: I think I highlighted what my concerns were.

Councilmember Yukimura: Okay. I am done. Thank you.

Committee Chair Hooser: I have a question or two (2). Is there anyone else before I start? I think it was last time we spoke. I am not sure if it was you or the Police. One of the last meetings, I am not sure if we were talking about the leash law. I believe you said that eighty percent (80%) of leash law violations people pay their ticket or so in round numbers. Only twenty percent (20%) or a small number go to court, but mostly they just pay their ticket. We talked about similar kind of thing where people call the police because a dog is running loose, police get there, the dog is no longer running loose or the dog is on their property, and the burden of proof, but you have the neighbors all say, "I saw the dog and that is sufficient to write the ticket." This is, in my mind anyway, a similar kind of situation where it is a violation, it is a similar situation where the person gets cited or warned, they go to court, they either pay the ticket or they contest it. The leash law similarly when that law was passed, it did not apply to cats or other animals. It applied to dogs because dogs were perceived as being the issue where other animals might be running loose. To me, that is kind of the smoke, the same thing, the rationale basis. This is people are complaining about and there are issues about fireplace smoke. So, that would be, I

guess, my question. I think we pass lots of laws that addresses egregious violations but do not address everything.

Mr. Kollar: Thank you for raising that point. I think the rationale behind the leash law was to prevent dogs from running loose and either biting people or getting hit in the roadway because I think it applies to big livestock animals as well causing injuries that way. I have never seen a case come into my office of a person being bitten and injured by a cat that was loose in the neighborhood. I think it is apples and oranges to talk about that.

Committee Chair Hooser: For the record, I have been bitten by a cat before. True story. It bit my foot.

Mr. Kollar: I am very sorry that happened.

Committee Chair Hooser: I reached out to pet it with my foot and it bit my foot. I think that is the question I have. Any other questions for the Prosecutor? No. Officer Asher is here. Thank you very much.

Mr. Kollar: Thank you.

Committee Chair Hooser: Did anyone have any questions for the Police?

Council Chair Rapozo: I have for the County Attorney, but again, I am a non-Committee member so I will go last.

Committee Chair Hooser: Councilmember Kagawa.

Councilmember Kagawa: I have a question for Officer Asher.

Committee Chair Hooser: Please.

Councilmember Yukimura: Assistant Chief.

Committee Chair Hooser: I know. Thank you.

Councilmember Kagawa: Or Deputy.

Committee Chair Hooser: Assistant Chief Asher.

Councilmember Kagawa: Assistant Chief.

Committee Chair Hooser: Thank you very much. How is your Harley Davidson?

ROY ASHER, Assistant Chief: All good.

Committee Chair Hooser: All good. Thank you for being here today.
Councilmember Kagawa.

Councilmember Kagawa: Thank you for being here. Have you gotten a chance to...

Mr. Asher: I just read it.

Councilmember Kagawa: ...read the amendment. I just want to know your thoughts about passing this amendment and bill, the impact, and the ability of Kaua'i Police Department (KPD) to enforce this potential new law.

Mr. Asher: For us it is always difficult, the enforcement part, that is what is concerning to us. In reading this, Mel can attest. When we try to enforce certain laws, people always play the lawyer game with us there and we have to deal with that. In reading this, I am trying to play devils' advocate. What happens on a no-burn day when somebody says, "I am roasting hot dogs at the same time," then what do we do? Do we still enforce this? When you go to Kōke'e often time when we use the cabins up there, fireplace and we roast hot dogs and make s'mores. What does our officers do now? How do we address that? It is a loop hole. That is one thing.

Committee Chair Hooser: Okay. Do you have other questions?

Councilmember Kagawa: No.

Mr. Asher: The enforcement is still difficult for us.

Committee Chair Hooser: Right. Councilmember Yukimura.

Councilmember Yukimura: There is nothing here that it exempts...I mean, are you saying that they are going to say cooking mushrooms is a customary...

Mr. Asher: Marshmallows, s'mores, or hot dogs.

Councilmember Yukimura: Marshmallows. Sorry.

Mr. Asher: Because it does make that exemption to cook, right? Am I reading it right?

Councilmember Yukimura: Well, it says, "Does not apply to other cooking activities."

Committee Chair Hooser: So, other cooking activities.

Councilmember Yukimura: Good point though. Let us see.

Mr. Asher: Because that is what the officers are going to have to deal with.

Councilmember Yukimura: Okay.

Committee Chair Hooser: If I can interject for a second.

Councilmember Yukimura: Yes, go ahead.

Committee Chair Hooser: I appreciate you coming and I apologize for the first part of the conversation you were not part of. Just to kind of restate, this is an effort to make enforcement easier. So, it is only saying on no-burn days and it is only when you are burning at a fireplace inside a house. It does not apply to Kōke'e, only R-4.

Mr. Asher: Right.

Committee Chair Hooser: So, only dense neighborhoods. I think the intent on that aspect about that cooking, it says, "Shall not apply to other cooking activities."

Mr. Asher: Right.

Committee Chair Hooser: So, it still applies to fireplace burning.

Mr. Asher: Right.

Committee Chair Hooser: On no-burn days.

Mr. Asher: Okay, but you...

Committee Chair Hooser: But other cooking other than fireplace would be exempt is my understanding.

Mr. Asher: I am trying to head off everything because I do not want to...

Councilmember Yukimura: Yes, it is good.

Mr. Asher: I do not want our officers now to get a notarized complaint because he is trying to enforce this when they are saying "No. Yes, it is a fireplace, but we are cooking our hot dogs on it, I can cook, and that is what I am doing." I do not want to put our officers in that situation, now what do we do? If I get that answered, then yes. Until those kinds of answers are answered, it is difficult for us to buy into this.

Committee Chair Hooser: Councilmember Yukimura.

Councilmember Yukimura: Thank you very much, Chief, for bringing up that point because only you with your kind of background would know what kind of excuses they would try to use. If we said something like "This Article shall apply to fireplaces or other smoke-generating indoor heating devices even when used in cooking and shall not apply to other cooking activities," that might take care of your marshmallow scenario.

Mr. Asher: Yes.

Councilmember Yukimura: Are there other things that you can think of that we have not anticipated? Assuming that there is not, would this work? I am thinking it will work better comparative to the original where you had to prove impacts to health. Now all you would have to prove is operation of the fireplace. I would think photos of the smoke coming out of the fireplace would be kind of the physical activity. I mean, we have seen video tapes of that and that is pretty clear to me, but I am not a policeman having to enforce. I am done.

Committee Chair Hooser: Just to use the leash law again because I think we talked about that before. I envision this as a similar scenario. There is a complaint, officer goes, sees the smoke, knows that it is a no-burn or checks to see if it is a no-burn day, knocks on the door, and informs the person, "Hey, you cannot do

this," and/or cites them. They go to court, eighty percent (80%) of the people apparently pay the fine, and then that is it. Twenty percent (20%) may contest it. That is the idea of just trying to just focus in on a very small amount and that they would learn like a leash law person maybe, that a couple of fines they stop doing it. Do you have any other...

Mr. Asher: No. If the officer's observations are documented through video or photograph and that is acceptable to the Prosecutor, then that is what we will do. If we get there and there is no smoke anymore, then we have to confer with the Prosecutor if he is willing to accept the case based on the complaint from the neighbor, and then we will refer it to them for prosecution or not. We will likely not cite because we do not have the evidence yet, but give it to the Prosecutor for a complaint of summons. If he feels that is enough that he wants to bring him to court, then we have a complaint of summons issued.

Committee Chair Hooser: Okay.

Mr. Asher: But if we see the smoke and that is acceptable evidence, then we cite on the spot.

Committee Chair Hooser: Okay. Thank you. Any other questions? No. Thank you so much. We have a question for the County Attorney from Chair Rapozo.

Councilmember Chock: If I could just say, I had a conversation with the Department of Health, Clean Air Branch this afternoon. Apparently what they do is they have a listing that they call or E-mail on no-burn days for agricultural burning. Anyone can be added to that list if they make a request. That is one way that it gets done right now. They said that there were other options to do it as well.

Committee Chair Hooser: Thank you. As we were speaking, I think I remember that Ron Wiley frequently talks about no-burn days on the radio in the morning also. So, there is some public discussion about those. Thank you.

Council Chair Rapozo: Thank you. Mauna Kea, I am going to take a whole different perspective of this Bill because I do not believe that the enforcement is the issue. I do not. I do not think enforcement is a problem. I think the officer goes up, smoke, no-burn day, cite, and the Prosecutor takes it to court. No-burn day, that is already in existence for the illegal burn. That is not an issue. That is not a prosecutorial issue because you can call the fire station before you want to light up your fireplace. It is what it is. If you did not see the speed limit sign and you got stopped, sorry you get the ticket. You can go tell the Judge why you did not see it. You were going too fast. That is why you did not see the speed limit sign. That to me, is a weak argument. I have a bigger concern. My concern is the rights of the property owner. The person that invested money in a fireplace when he built his house and got a permit. I think Mr. Kollar stated it in his original opening remarks about one would argue that a fireplace is a cultural event. You do not build a fireplace just to have a fireplace. You build a fireplace not to give Santa Claus a way to come into the house on Christmas Eve, but it is a functioning appliance. My question to you is what happens to the person that had invested the money, has the legal right to use a fireplace, and now the County is passing a law that is going not take away that right. I do not care if it is thirty (30) days a year of whatever it is, but at some point, is going to lose the use of something that he paid for and got permitted for. Much like the Transient Vacation Rentals (TVRs), when we passed the TVR Bill, we could not say "no." At the time the bill was passed, they were legally operating so we

could not kick them out. What do we do to those people? Do we pay them off for the fireplace because they no longer can use it?

MAUNA KEA TRASK, County Attorney: For the record, Mauna Kea Trask, County Attorney. I am happy to answer your questions. In doing so, I have opined on this issue previously, but in specific response to the questions today and given the current amendments, I would like to be able to just have this discussion without infringing upon any other privileges or anything like that if that is alright. If you can understand that. You are the client. I just want to make that clear. Okay. If I can contextualize this real fast. Hawai'i Revised Statutes (HRS) 46-17 Regulation of Certain Public Nuisances as you know, provides that the "Council or any County may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance." Now specifically public nuisance. Public nuisance, it is not a statutory creation. It is common law which means it goes back to Roman Justinian Code. Essentially what it says is if you have property like Council Chair says, no one can infringe upon your use of that. That is like a nuisance generally. Public nuisances are those uses and things that cause injury to the general public. Private nuisances cover those things that offend private parties. So, that is the operative word in HRS 46-17, "public nuisance" which is what was stated earlier. I think it was read testimony by Mr. Lewis. Because it is common law, it is kind of an amorphous area. It is not clear by statute and it is kind of built upon case law and precedent in the past. In Hawai'i law, this is citing Marsland vs. Pang. "Nuisance is a term which does not have a fixed content either at common law or at the present time. Compelling reasons of policy require that the responsibility for establishing those standards of public morality, the violation of which is to constitute nuisances within equity jurisdiction be left to the legislature" of which you are. So, that is clear. Everything is within parameters. I think what Council Chair brings up is a good point regarding what those parameters are and limitations. "A local legislative body may enact an ordinance declaring that a previously lawful activity," which in this case is fireplace use, "will thereafter be deemed a nuisance. Such legislation will be upheld against the Constitutional challenge if it comes within the police power in the sense that it has a real and substantial relation to the public health, safety, morals, or general welfare of the public and is neither unreasonable nor arbitrary." I think that touches upon those issues regarding is the fireplace different than an *imu* pit? Is it different than an outdoor barbeque? Smoke is smoke. I think that is what the Prosecutor was trying to articulate, was whether a Judge will find it unreasonable or arbitrary. Those pertain to the specific amendments. I do not think that touches your general authority to regulate smoke, but if you are going to make specific exceptions, you are going to have to articulate why or it is going to fail. Court will find it failed. Regarding the taking, that is another good issue. Your ability to identify what constitutes a public nuisance is within your purview. I believe Councilmember Yukimura stated that and this body stated that. If you find a rational basis, it will be upheld and that is the lowest threshold of analysis. When there is a question as to fact whether it may or may not, courts are instructed to find that well then there is a question of fact, the legislature has made its call, and therefore it will constitute a public nuisance. The deference goes to the body; however, a party could challenge the constitutionality of this ordinance in an enforcement proceeding specifically. In doing so, they have to prove that "it is not debatable, that is has an substantial relationship to public health, safety, or general welfare and such an ordinance will be declared invalid when it plainly appears that it does not tend in any applicable degree to promote those ends that the power to legislate has been exercised arbitrarily." The reason why that is important is because let us see...I am sorry. Give me a moment. I had the taking language somewhere. Okay, here. Even though a government has

considerable latitude in regulating property rights, "a municipality may not, under the guides of its police power, impose restrictions that are unnecessary and unreasonable on the use of private property of pursuit of useful activities," warmth and all of those kinds of things. "Compensation is required when property is actually taken from the owner and put to a public use even if that use may enhance the public health, morals, or safety." Those are the issues. I am not able to opine today that this is a taking. If I had to, I would say probably not. It is subject to reasonable regulation. I do not think it would be a taking. I do want to highlight, and this has been said by the body before, that irrespective of the fact that this ordinance exists or not, if it is passed or not, it does not prohibit and I think this message should be sent to the general public, it should not prohibit you from protecting your family in a court of law. It is clear and the law clearly states under HRS 663-1, you can sue somebody who injure you or your property. You can do that. You can stop them. You can prohibit them privately. Just so you know and the public knows, the County has been dealing with the specific issue as it relates to Ms. MacDonald for approximately four (4) to six (6) years now. I have spoken with her in the past. I have reviewed her Codes, Covenants, and Restrictions (CC&Rs) in the Molo Street subdivision. It does provide in her CC&Rs that every neighbor in that neighborhood can seek action against each other if there is otherwise lawful activities are causing them injury. I have spoken with her about this, she is aware of it to my knowledge, and...

Committee Chair Hooser: Thank you.

Mr. Trask: Yes. It just was not pursued.

Committee Chair Hooser: Thank you. I mean, you have given us a lot of information. The question was about...

Council Chair Rapozo: I just...

Committee Chair Hooser: Go ahead.

Council Chair Rapozo: The exemption of certain types of smoke which is the *hibachi* and the *imu* and huli-huli chicken, how do we get around that? How do we get around that as far as passing a law? Again, it almost goes back to the pesticide where it is dangerous for one (1) group but not for another. We can exempt this group, the golf course we are not going to bother. I have a real difficult time. How do we get around that in court that we are basically saying only this one (1) specific type of smoke is going to be addressed when we all know that an *imu* or huli-huli chicken creates a whole lot more smoke than a fireplace?

Mr. Trask: It is a policy call and that is why...

Council Chair Rapozo: The policy, I know we can do whatever we want, but I want to know from you. What is the legal thing?

Mr. Trask: Legally, and again this is strictly legal. This is not to infringe upon the possible considerations or reflect my own personal opinion, but the first draft was better. It clearly said, "Public smoke." You shall not smoke people out that causes injury to people. Simple. It is difficult to prove, it is difficult to enact, and I understand that. The integrity of the law from a legal perspective is better, because it says smoke is a problem. Now, it has adverse social and cultural affects. I understand that, but from a legal perspective, it is the better one.

Council Chair Rapozo: Thank you.

Committee Chair Hooser: Councilmember Yukimura.

Councilmember Yukimura: Thank you for your legal input on this. The findings in the Bill do talk about the dangers of wood burning smoke. A lot of times *hibachi* or even smoke meat is not always wood and it is not for as long a period of time as a fireplace that is running for several hours. Fireplaces are explicitly exempt from the Department of Health regulations which I think these others are not. I think there is a rational basis for us making the distinction.

Mr. Trask: I think so too. It is injurious.

Councilmember Yukimura: And it is a legislative decision as you say. Is there not also a balancing of property rights that someone not being able to lie in their own home on their property with air to breathe?

Mr. Trask: Yes, and that is why I think this issue is either more properly a private nuisance issue between two (2) neighbors because I am sure Ms. MacDonald gets smoked out whether or not it is a burn day or not.

Councilmember Yukimura: But Mauna Kea, just because it is amenable to private action, does it mean it is a bar to public action?

Mr. Trask: No. It just makes it more complex. That is why I think...

Councilmember Yukimura: Really because would she not have to prove health issues?

Mr. Trask: But apparently she can.

Councilmember Yukimura: In a private action.

Mr. Trask: She can.

Councilmember Yukimura: But not for a...

Mr. Trask: But it is preponderance of the evidence.

Committee Chair Hooser: I think...

Mr. Trask: It is a different evidentiary standard.

Committee Chair Hooser: If I could interject for a second.

Councilmember Yukimura: Sorry, but we are creating a strict liability standard here based on no-burn days which I believe we can.

Mr. Trask: The only strict liability, and again, I practice in criminal law. I started in criminal law. In strict liability crimes you are looking at statutory rape. That is one (1) strict liability crime. All of these other ones, they are tough. I have beaten Driving Without A License (DWAL). I have beaten speeding tickets. I have beaten all of these things and they are tough. I do not think Justin is

making up issues. I respect those determinations. That is why I am saying it is a tougher policy call to make when you do it super clean. You can have faith in the integrity of the law. If you start amending it to carve out, again, socially appropriately, these nuances, it makes it more difficult and more apt to scrutiny.

Councilmember Yukimura: Okay.

Committee Chair Hooser: If I could do a follow-up of that.

Councilmember Yukimura: Then I have another one.

Committee Chair Hooser: Okay.

Councilmember Yukimura: Okay. Go ahead.

Committee Chair Hooser: I understand what you are saying and we started that way. I think we could relate it to the Noise Ordinances. We have boom box, we have noise, and we have barking dogs. We carve out certain things where there is no ordinance against other animals necessarily making the noise. So, we do, as lawmakers or policy makers, focus on different things and the courts have upheld our rights to do that. I understand what you are saying. It is easier and cleaner, but we do have the ability to isolate as a policy what we believe is where the problem is and regulate that.

Mr. Trask: Yes, within the limits as I described.

Committee Chair Hooser: Okay. Thank you.

Councilmember Yukimura: I have a question.

Committee Chair Hooser: Go ahead. Councilmember Yukimura.

Councilmember Yukimura: Our research has also shown that non-EPA certified fireplaces have been outlawed in certain places because they do not capture the pollution as to certified EPA fireplaces.

Mr. Trask: Yes, and I am sure you could not make smoked meat in Los Angeles (L.A.). No way. You could not have a smoke house in California. Absolutely not.

Committee Chair Hooser: Let us not go there.

Mr. Trask: No, but I mean the strictest air quality ordinances in this Country are large municipalities, specifically L.A., west coast, because of the cars, because of all of the use, and because of all of the industrial pollution. I am not encroaching on your rationale basis. I am not encroaching on your policy call. All I am doing is I think if you were to ban fireplaces, you would have a taking, and also you would have grandfathering issues specifically TVRs. I do not think this is a ban.

Councilmember Yukimura: No it is not.

Mr. Trask: No it is not, but if you declare the smoke itself a nuisance and what that means and a specific type of device emanating smoke is and

another is not, I am just saying the limitations and parameters look at arbitrariness and they look at things. I do not think a lot of hunters have the means to launch a Federal Court challenge to this thing. The probability of that kind of thing happening, it most likely will come out if it comes out at all in enforcement action if someone decides to contest it, and I agree. But it is just those issues are what you are dealing with here. That is all.

Committee Chair Hooser: Why would hunters file an action on a fireplace on no-burn day?

Mr. Trask: Oh, it is just that those are the types of people that showed up and spoke against it. Hunters usually make smoked meat.

Committee Chair Hooser: But as it stands here, that is not part of the discussion I do not think.

Mr. Trask: True.

Committee Chair Hooser: Okay, thank you.

Mr. Trask: But I am just saying that somebody else might.

Committee Chair Hooser: Go ahead.

Councilmember Yukimura: There are restrictions on open burning and so forth in California because they found that air quality actually kills people. Poor air quality kills people. So, our no-burn days are coming closer to that kind of situation. People are affected and that is why there is some justification on no-burn days to restrict things. All we are doing is we are adding on a restriction to fireplaces which actually has no rational basis to be excluded from Department of Health's rules in my mind and we are just adding it on as a County public nuisance effort. I think there is some rationale here.

Mr. Trask: That is your policy call to make. The world is changing, culture is changing, and Kaua'i is changing. That is what this will be. That is the effect.

Councilmember Yukimura: But we are explicitly trying to exclude any major cultural changes and cultural activities.

Mr. Trask: Again, I have specific regards and understanding to what a court will look at and the limitations they operate in regarding arbitrariness, capriciousness, and all that kind of things. That is all.

Councilmember Yukimura: Okay. Well, I think we are clearly not arbitrary and capricious. That may come ultimately to a court decision, but as legislators I think we are abiding by our parameters or we are trying to.

Mr. Trask: That is good.

Councilmember Yukimura: Thank you.

Committee Chair Hooser: Any other questions for the County Attorney?
If not, thank you very much. Mr. Trask, thank you.

Mr. Trask: Thank you.

Committee Chair Hooser: Anyone from the community before we call the meeting back to order would like to speak? Would you like to speak?

Mr. Kuhaulua: My name is Ben Kuhaulua for the record. Thank you for letting me listen to everybody who talked. I hear you folks talking about cooking and putting in an ordinance for taking care of us. We are taken care of already from the State Health Department and from the State Constitution. So, that is out already. Sitting here and listening to all of this like Mauna Kea just said, times are coming and things are changing and it is going to change. I am not going to change. It is in my blood as a Hawaiian. It is in me what we do. Right now, I feel kind of disturbed right now listening to it. You folks are listening to all of these people that work for you folks coming here and saying that you folks are going the wrong way. It should be a neighbor go to the court or call the cops, take them to court, and figure it out in court. You folks opened a whole of worms right now. Everybody that is listening to this every time that they turn on the television, you have people who are for it and people who are against it. I am against one hundred percent (100%) all the way. I will always going to be against this Bill or anything to do with something that can jeopardize my rights. I feel for the MacDonalds, but I do not come over here or pay attention to what you folks do. I broke enough remote controls throwing them at the television listening to what you folks talk about on this matter or any other matter. Right now, I think you folks opened a big thing. Now my fight is going to be really big for me. It is just that everybody that you folks bring up that works for you folks say that you folks are going the wrong way. It should be in court. It should be in court because without a doubt there are plenty of *puka* in this thing and plenty doubts going on among yourselves and the public. So, how are you folks going to pass something or continue going on? To me, it is a waste of time going on the same thing. I am hearing the same thing. I am not a lawyer. I do not know anything about law, but I hear the same thing from you folks. It is not feasible. We do not know who is going to regulate it. It is the State. It is the County. It is your body. You are going in a circle. I am coming dizzy sitting down over there. I just do not understand. You do not need to say anything about cooking anymore because I know that I am protected, but my protection that I have right now like Mauna Kea said, progress is coming. I know one day I will have to stand up and fight again because it is going to be taken away because of air quality or because of the neighbors not showing the *aloha*. There is no *aloha* already. When you cook, the person on the side of you knows you are cooking because he is invited to the party. If they do not talk or whatever it is for whatever reason. I cannot move. I am not going to move. I was born and raised here and I am going to die here. I see the light blinking. I do not know what else to say, but I am against this. I wish you folks would hurry up. I am against this and I will always be against this. Thank you.

Committee Chair Hooser: Thank you very much for your testimony. Thank you. Anyone else would like to testify on this issue? Please come forward and introduce yourself for the record.

TINA SAKAMOTO: Good afternoon County Council. My name is Tina Sakamoto. I am in opposition of Bill No. 2573. I would like to bring up four (4) or five (5) points. The first point I would like to address is this is stated as a public nuisance. How in the world can it be a public nuisance when in 2012 for a chimney,

there were one (1) or two (2) complaints? In 2014, that is one (1) or two (2). Again, in 2012 out of the seventy-three (73), seventy-two (72) of them was from the same person or same issue. This is not a public nuisance. It does not affect the general public. So, it really does not constitute a public nuisance. This is a private issue. A second point is the fireplace is State exempt and it is a legal structure, County permitted. The third point I want to bring up is JoAnn did mention a balance of property rights. This is addressing R-4 zoning. So, I believe this means a residence within an acre. How is it a balance of rights when you are going to say, "If you live in a R-4, you cannot do this, but if you live in a larger land area like an estate, you can do whatever you want." This is not a balance or property rights. This is an erosion of property rights. You are penalizing small landowners and you are letting the larger landowners have free reign. A fourth point I would like to make is the statement in Section 22(B), "Smoke-generating indoor heating devices." This was unclear and I think the introducer was a bit unclear with what this term really means. If you have an unclear bill, how can you enforce it? It is not a good bill. It is going to cost us more money again. You have heard from our attorneys, you have heard from the agencies involved in enforcing it, and the possible problems. I think the proper action would be to kill this. I think it is a poor inefficient use of our assets and our funding. It should be taken to the State level and the action on a private matter could be civil litigation. Thank you.

Committee Chair Hooser: Thank you very much. We have a question from Councilmember Yukimura.

Councilmember Yukimura: Hi Tina. Thank you.

Ms. Sakamoto: Hi.

Councilmember Yukimura: What was your second point?

Ms. Sakamoto: My second point was that a fireplace is a State exempt and is a legal County permitted structure.

Councilmember Yukimura: Okay. Your fourth point was?

Ms. Sakamoto: My fourth point was on the unclarity of a smoke-generating indoor heating device.

Councilmember Yukimura: Oh yes. Okay. Thank you.

Committee Chair Hooser: Any other questions? Thank you very much. Anyone else would like to speak?

There being no further testimony, the meeting was called back to order, and proceeded as follows:

Committee Chair Hooser: We have a motion to amend. Is there any discussion on that motion to amend? Councilmember Kagawa.

Councilmember Kagawa: Yes. I will make all of my comments one (1) time. I am one hundred percent (100%) in agreement with Mr. Kuhaulua. When I ask some of my advisors, as I call them, they include former Councilmember Bob Yatsuda and my former football coach Kazo Ueoka. I tell them, "How can I improve on this Council?" They watch the Council from time to time and then tell me, "Close

the mouth, open the ears, and listen.” Today, I think this Council fails to listen. We sit here, we hear from the agencies that our expected to carryout the amendments, and when they answer we contradict what they say because we do not like the answer. It is frustrating. As Mr. Kuhaulua said, let us hurry up on this issue. This is not doable. The intentions yes, are good, but the solution is bad. What is the solution? The whole Kaua’i is watching this issue. I get suggestions from the community and they said, “They have to work it out.” If the neighbors are fighting, they are going to burn more.” They are going to burn on purpose because what you have is you have the failure like Mr. Kuhaulua said, of neighbors. If you are cooking, invite them over or give them some fish when you are done cooking. I think having that kind of relationship can work. Now is this situation beyond that point? Probably, but there is another solution. In a civil case, you do not have to prove beyond a reasonable doubt. I think that is what Mauna Kea and Mr. Kollar explain. I think if you have a good attorney, you can win in a civil judgment that the civil judgment may be substantial enough to cure the problem. How to fix a private problem and in looking at this Bill and the amendment, it just does not add up. We have been sitting here for three (3) or four (4) long meetings and we have heard different amendments and we have heard the same responses from the Prosecutor, the Police, and the community. Basically what the overwhelming voice is saying is “Do not even go there because it will open up possibly, a bigger can of worms down the line.” If you pass this Bill that as is stated in this amendment, as Mauna Kea pointed out, a lot more smoke is generated from *hibachi* or smoking over a long period of time. You look at Chicken In A Barrel. We had Ms. MacDonald’s daughter-in-law said they created a ton of smoke. I am just thinking that if we start passing these kinds of ordinances I think the police is going to be flooded by calls, it will create more neighborly disputes because they will have a vehicle to start calling the police or calling the Prosecutors, and I just think this Bill is not tested anywhere. Maui has had it since 1950 and they have not done anything with it. So, what is the sense of them having it on their books? They do not enforce it. I mean, if we were copying another County or municipality that had some success, I would say, “Okay, there is a track record that it could succeed.” Why are we testing it here now when there is one (1) or two (2) complaints out of the whole community? Like I said or like Ben said, we feel for the MacDonalds. That situation is one that any of us would not want to be in. I do not think this is going to fix the problem. I will be voting “no” on everything. Thank you, Chair.

Committee Chair Hooser: Other comments members? Councilmember Chock.

Councilmember Chock: Thank you. We pretty much killed this in discussion. That is one (1) thing for sure. I have heard the comments from our enforcement and Prosecuting Attorney.

Councilmember Yukimura: Point of order though. We are talking about the amendment, right?

Councilmember Chock: Yes.

Councilmember Yukimura: Okay.

Councilmember Chock: Let me just say that. I will be speaking to the amendment because I am supportive of the amendment although we have gone in a full circle with some of the comments that have been made. I think that it takes us closer to where this can go. That being said, I am still concerned about the main bill.

I think I will save my comments for the main motion on this bill. No-burn days are in affect not in Hawai'i, but they are around in California. I was just in Lomita and they do have no-burn days specific for fireplaces. The question again that comes up is, is that appropriate for Kaua'i? Are we ready for that? That is where I do not think I am in agreement yet that we are. Like Mr. Kuhaulua said, this thing is going to come back and I believe it will come back. Maybe a couple years from now or maybe twenty (20) years from now. I appreciate the discussion that we had because we are only going to get to solutions that we can actually deal with if we have the conversation. It is not going to get any easier. That is why we have to talk. Again, I appreciate the work that everybody has put into it in trying to problem solve here. It does not solve their problem and it is an isolated incident. I am committed to seeing that problem is addressed. I will be supporting the amendment. I will most likely not be supporting the main motion. Thank you.

Committee Chair Hooser:

Councilmember Yukimura.

Councilmember Yukimura: Yes. All this talk about neighbors should work it out, if it always happens where neighbors can work it out, we would not need government. We would not need laws. We need laws when neighbors cannot work it out. That is in the case of barking dogs for example. We need the police power to regulate what is good for the body of people. Now people have said this is not a public nuisance, but on no-burn days when the atmosphere is bad, it is a public nuisance to burn any fire. Since fireplaces are not covered on no-burn days, that is all this amendment would apply to. It is appropriate, I believe, as a public nuisance. A fireplace is a legal entity but we can regulate use. We regulate the use of a house. We regulate the use of cars. It is still property, it is legal, but you can regulate use when it affects other people's health and well-being. That is what we have an issue here for right now. R-4 zoning is appropriate because the impact is different in places with closely placed buildings versus places where there is a lot of empty space around and smoke dissipates. There is a rational basis focusing on R-4. This is not only one (1) family. We are looking at a petition here signed by forty-two (42) people. It is different in a residential area. Chicken In A Barrel is often done in a public place or in a commercial space. In a residence, it has a different impact. There will not be a flooding of calls because yes, there is not a huge number of people affected. So, good. We will not have a flooding of calls. This is a very narrowly drafted thing that excludes cultural impacts. As Ben said, we are excluding that. We are not wanting to affect it and I can understand why there is a fear of things coming down the pike. At each point, we have to say "no" when we have these affects. We have said "no" to affecting cultural practices in this Bill. We are trying to walk a fine line of addressing real harm to neighbors who want to have a peaceful enjoyment of their homes which we all should be protecting for each other. This is not going to give complete protection because it is only on no-burn days, but it is completely justified on no-burn days. The enforcement people have some concerns, but they have said this is much better than the other one. We should allow it to see how it work. I am voting for the amendment of course.

Committee Chair Hooser:

Councilmember Chock.

Councilmember Chock: Just a point of clarification. I am supportive of the amendment minus the second piece of that amendment that includes the smoke vapor or smoke emitting.

Councilmember Yukimura:

Ah, okay. Very good.

Councilmember Chock: Smoke-generating indoor heating devices.

Councilmember Yukimura: Even when used for cooking to clarify the fireplace. So, we may need a moment to take that out.

Councilmember Yukimura withdrew the motion to amend Bill No. 2573, Draft 1 as circulated, as shown in the Floor Amendment which is attached hereto as Attachment 1.

Committee Chair Hooser: If it is okay with the body, we can make those amendments and continue the discussion.

Council Chair Rapozo: I think you need a caption break.

Councilmember Yukimura: Okay. Why do we not do that too?

Committee Chair Hooser: Okay.

Council Chair Rapozo: It has been over two (2) hours.

Committee Chair Hooser: Okay. Let us take a caption break now. What is that?

Council Chair Rapozo: And do the amendment.

Committee Chair Hooser: Ten (10) minutes?

Council Chair Rapozo: Yes.

Committee Chair Hooser: Ten (10) minutes. Okay. Thank you.

There being no objections, the Committee recessed at 3:41 p.m.

The meeting reconvened at 3:52 p.m., and proceeded as follows:

Committee Chair Hooser: We had a motion. I think we need to withdraw the motion and the second.

Councilmember Chock withdrew his second.

Committee Chair Hooser: Okay. The original amendment has been withdrawn and the second is withdrawn. So, we will need a new motion and a new second for the new amendment that has been slightly modified.

Councilmember Chock moved to amend Bill No. 2573, Draft 1 as circulated, as shown in the Floor Amendment which is attached hereto as Attachment 2, seconded by Councilmember Yukimura.

Committee Chair Hooser: The amendment has been circulated. We can continue the discussion. Other members? Anyone else would like to speak before I speak? I would just like to then say a few words. I want to applaud Councilmember Yukimura...

Councilmember Yukimura: We are voting on the amendment?

Committee Chair Hooser: We are doing discussion on the amendment.

Councilmember Yukimura: Okay, great. Thank you.

Committee Chair Hooser: We had some prior discussion on the amendment, but we do not need to repeat all of that I do not believe. I wanted to thank Councilmember Yukimura for her initiative on this and it has greatly improved the enforceability of the measure, simplifies the measure, and does not go far enough in many respects as the original measure proposed to do, but I think the nature of law making is incremental change. So, this is a small step in the right direction. It has a legitimate solid legal nexus to public health, the Health Department, and no-burn days. No-burn days are in place because of people's house. It is reasonable in my opinion, to say that you cannot do this particular activity on no-burn days and it is limited to only dense neighborhoods. There is plenty of precedent for this type of legislation and like someone said before, I wish we lived in a world where everybody got along a little better, but that is not the case. We have noise ordinances because people got tired of asking their neighbor to turn the stereo down or turn the television or down or quiet the party and the neighbors refusing that over and over and over again. Houses are just close together. People cannot sleep. There is real damage. The principle of trespass whether you are trespassing with noise or trespassing with smoke. When your activity crosses over to your neighbor's activity, it should be against the law, in my opinion. There has been a lot of work put into this. The original Maui law that the County Attorney referred to and was originally proposed was broad and it was enforced. The Maui Police Department issues citations every year on that Ordinance. They issue five (5) or twelve (12) a year the last two (2) years at least. I do not believe the prosecution of them went far, but they did go to people's houses and tell them, "Please do not do this activity" and I believe issued some citations. So, there was an attempt at enforcement. It is not like this law was passed in 1949 and nothing ever happened to it. The Maui Police Department has actively utilized this law. I have that and I would be happy to circulate that letter. Actually, I talked about that at prior meetings. Interestingly enough that was passed in 1949 on, I believe, a 3:2 Council vote in 1949. So, it was not a unanimous vote at that point either, but they recognized it as a problem at that time. Unfortunately, we have these kinds of situations. I think there is plenty of legal authority to pass this. There is no question about that. I appreciate everybody's patience, the Councilmembers as well as the public's patience, and the Prosecutor and the Police weighing in on this. We have every step of the way, done our best, I believe, to accommodate the concerns expressed by both the public who are concerned about cooking outdoors as well as the Prosecutor and the Police. If there is not further comments, I will call for a vote on the amendment.

The motion to amend Bill No. 2573, Draft 1 as circulated, as shown in the Floor Amendment which is attached hereto as Attachment 2 was then put, and carried by the following vote:

FOR APPROVAL:	Chock, Yukimura, Hooser	TOTAL – 3,
AGAINST APPROVAL:	Kagawa	TOTAL – 1,
EXCUSED & NOT VOTING:	Kuali'i	TOTAL – 1,
RECUSED & NOT VOTING:	None	TOTAL – 0.

Ms. Arakaki: 3:1.

Committee Chair Hooser: Okay, the amendment has passed. So, the Bill as amended. What I would suggest as the Chair, I would like more time. I need to consult with the Police and the Prosecutor, I have questions outstanding to the fireplace manufacturers, and a whole lot more work I would like to do. I know I have talked to other Councilmembers who also want to explore other options. So, what I would like to do is ask for a deferral without a date specific to allow me to do that investigation. I did not want to ask for an indefinite deferral because that would push it into 2016, but I would like to ask for a deferral and honestly, it will take some time for me to get this information. So, I am not sure what the date specific and rather than just schedule something and go through it, I would like to ask the Committee to support a deferral and then once I am able to gather the information together, I will then reschedule the item at some point in the future. If I can ask for a deferral. Yes? Oh, did you want to speak? I am sorry.

Councilmember Chock: Yes, if I could Chair.

Committee Chair Hooser: Yes, go ahead.

Councilmember Chock: I will make this real quick, Councilmembers. I am supportive of the deferral if that is what you want, Chair. I just wanted to again state where I am with the main motion. I am happy that we are not moving this forward because I am in no place to support the main motion right now mostly again, because in my opinion, isolated incidents as we have seen from the records and what was shared by the Police Department and the Health Department. I just want to reiterate some of what I think often gets lost in this process which is that a problem comes us, we try and solve it, and we cannot. So, it gets kicked back out, but the true essence of what the issue is never gets addressed. When Arthur Brun was here a couple of weeks ago, he had visited the residents. I went ahead and visited. I just wanted to share with you folks really what is going on. I have met with the Gonsalves for these specific incidents. It seem to me like they are willing to work towards an end and I went and took some pictures of the property and the actual fireplace which by the way is probably more than twenty (20) years old which is probably one of the issues. I found that with EPA standards, it probably does not meet that. The opportunity for us to look at an approved fireplace is something that I think not only the Gonsalves but some of the neighbors who I have talked to are willing to move together and try and chip in to do it. I know the gas thing was not something they are willing to do. As I looked into the research of this, there is a lot of dynamics that are specific to this one (1) residence or neighborhood and that is the fact that they are up against a cliff, the fact that they are in a little bit of a gulch, and the direction that the wind takes it. So, the height of the smoke stack, I think, is something that can be looked at in order to mitigate the smoke. I think that changing this really old fireplace is something that we can look at and also, the fact that the pitch of the roof is somewhat of an issue. I am working with someone on the Big Island who specializes in this and is an engineer on it that we can continue. My commitment as I mentioned earlier, I just wanted to state that for the record, is that we address the

issue. This is an issue that is found in one (1) neighborhood. While there may be one (1) or two (2), I still have not heard the details of that and that is why I am not supportive of the main motion. Do I think it will come back? Like I said, it will. I think that as we grow, we are going to have this issue become more prevalent. At this point, this is what I feel like we should be doing. Thank you.

Committee Chair Hooser: Councilmember Kagawa.

Councilmember Kagawa: First of all, I will not be supporting the motion to defer. I think we owe the MacDonald family the honest truth that the County should not be trying to pass a bill that is intended to help them that really is not going to help them because we have heard it. I do not know what the real reason is for another deferral. Mr. Kuhaulua said, "We came here how many times?" We are basically discussing the same thing and yes we are making amendments, but we are hearing the same responses from the main people, the Prosecutors and the Police. I think the best thing we could do and the most responsible things we could do is to put it to a full vote of the Council and vote it up or down with the amendment today. I did not support that amendment because I am done. I am not supporting any facets of this Bill as long as I keep hearing the same responses from the Police and the Prosecuting Attorney. To me, it is not being responsible and we are elected to be responsible to pass good bills, not pass bad bills. I think we vote it up or down and if it does not help the MacDonalds in the form of a bill, then let us work on the method that Mr. Chock...perhaps one of us who is not supportive of the Bill may be the effective communicator to try and get some cooperation. I have not gone there yet. I thought the proper way was to deal with this Bill first before going up there and trying to make myself available as a referee. I am willing to do that should the need occur. I am hesitant to do that kind of thing, but in this case, I think seeing the MacDonalds suffer coming here and really being brave through this whole issue, I think, deserves me putting my efforts to trying to help them. So, we will see where it falls. I may not gain any success. So, that is all I have. Thank you.

Committee Chair Hooser: Thank you, Councilmember Kagawa. Just to address your question about what the real reason for the deferral is, the real reason for the deferral is that myself and I believe the majority of the Committee want to help resolve this issue, help the MacDonalds, help others, the other forty-three (43) people who have complained, other people around the community, and we are not in the position right now to do that. I am asking for more time to work on this with other Councilmembers who are interested because the real reason is we want to help people. Councilmember Yukimura.

Councilmember Yukimura: Yes. I am glad to hear of a deferral and even more glad to hear of Councilmember Chock's investigation and of the possibility of a solution because that is really what we all want to see no matter what the path may be to it. A problem solved. I too have been looking at the idea of...one of the options was to require that fireplaces could operate only if they were EPA certified because

the EPA certified fireplaces are much less polluting and it is another way of regulating people's use of property which is a legitimate exercise of police power. That may even not be necessary if some kind of a voluntary process can be found to solve the problem. I think we should allow that process to unfold or come to completion and hopefully we will come to a solution. I think it is also proper to defer and have this public solution in advance for more research and also for use if the other solution does not work.

Committee Chair Hooser: Make the motion.

Councilmember Yukimura: I move...

Council Chair Rapozo: Can I...

Councilmember Yukimura: Chair wants...

Committee Chair Hooser: Yes. I thought I had been around asking everyone.

Council Chair Rapozo: Well, I am not a Committee member so I do not want to speak...

Committee Chair Hooser: Go ahead, Council Chair Rapozo.

Council Chair Rapozo: Thank you. First of all, I guess I am kind of disappointed that a deferral is up because I thought that we had discussed the amendment that if the amendment was going to be passed, then we would not need the deferral. Mr. Kagawa had suggested that if we were going to defer, defer early so we would not have spent two (2) hours. That was what I had thought, that if we had gotten through the amendment, we would have gotten been able to move this thing one way or the other today. So, I guess I am kind of frustrated. I agree that I think this needs to come to resolution soon. Every day that goes by, more and more discussions in the community that creates more and more anxiety and animosity that I think needs to be resolved. Let me just make my comments although I am not a Committee member. I do not know when this deferral will come back. I know that the longer it takes the more it brews in the community and that is not good for the health of this community. I just want to say that this is really...I think Ms. Sakamoto said it best. This is a private nuisance, not a public nuisance. I saw the petition with the forty (40) some odd signatures and it pertains to one (1) fireplace. It pertains to one (1) subdivision. It is not a public issue. It is a private issue. I feel the pain of the MacDonalds and I wish we could do something more, but the police power, the power to legislate and create laws is a very powerful tool. What happens the next time someone comes up to us and says, "Hey, Mr. Kuhaulua's *imu* is causing problems for our health?" What are we going to say? Sorry, Ben. Sorry. Live with it. Now we have to pass a law and amend this one and take out *imu* so that now we can enforce

against *imu*. If you read the Bill Section 1 and you look at the Finding and Purpose which is the structure of the Bill. That is justification. It talks about how dangerous smoke is, but it is not dangerous if you are an *imu* or a *hibachi*. Only for the fireplace. So, I am having a difficult time with that, that we do not do that. That is not what we do. Smoke is smoke. That is clearly stated. If the motive for the severity of this action of passing a law is the smoke, then how can you say it is only dangerous for one (1) segment of the community, one (1) neighborhood? I do not know how many fireplaces we have on the island, but I have not heard of a complaint from anyone else. As much as I feel for the MacDonalds, I believe that there are other remedies that are available to them besides a County law, a new statute. Mr. Miguel does the huli-huli chicken. It is mobile. He does it wherever he goes. I mean, is that going to be affected? Mr. Brun's smoked meat.

My point is this, when we get a complaint at this body is that how we respond? Pass a law even though it is not a public nuisance as I think Ms. Sakamoto clearly stated. Again, this bill thirty (30) days out of the year you get a no-burn day. So, for three hundred thirty-five (335) days, the MacDonalds are not going to see any relief. What are we doing? Just passing it so that we can we tried? We passed a Bill. So, we can say, "Okay, MacDonalds, we passed the Bill. Go on your merry way. At least thirty (30) days out of the year you will be protected." There is not real substance to this Bill, really, except it opens the door now for people like Ben, for people like Mr. Miguel, for people like Mr. Brun who their activity cultural or not, may impact the neighbor. I am concerned about that because how do we tell the next complainer, "Sorry, we are not going to address yours because the person that is doing it is Hawaiian." I am just being blunt because that is what we did right now. We took this Bill which stopped everything, and now we made it to an area where okay, we are trying to satisfy everybody but we want to make sure the MacDonalds are taken care of because we do. I think sincerely every one of us genuinely wishes we could help, but there is also ramifications.

Some Councilmembers brought up the Barking Dogs and the Noise Ordinance. There is one (1) huge difference. There is no investment, there is no fireplace, or an investment that the property owner paid for that is being taken away. A party? Yes of course. I think that everyone knows that sometimes parties get out of hand so we pass the law saying you cannot make too much noise. The leash law. There is no investment. You have a dog, it has to be tied up. This one involves a right that property owners have today that cost money that entailed an investment that we are basically taking away. So, I am concerned about that. I appreciate the amendment because I think it makes it a better bill, but I cannot support the Bill. I hope that the deferral is not because of the fact that I think this will not pass today. I would ask that would be done as soon as possible. Thank you.

Committee Chair Hooser:

Councilmember Kaneshiro.

Councilmember Kaneshiro: I held off on my comments too because I am not a Committee member. For me also, I have huge concerns about this Bill. Of course we want to help Ms. MacDonald, but looking at this Bill, thirty (30) days out of the year when she said the person burns every single day, I do not think helps her. If you look at it, there are other mechanisms that are easier and I think Justin said it, Mauna Kea said it, and that a private nuisance lawsuit is easier to resolve then if we were to pass this Bill and do this Bill. You do a private nuisance lawsuit, you will need an attorney, and you will need to gather all of the evidence. That is the same thing you will need to do if we pass this Bill. So, I do not see why we need to set a precedent by setting a bill like this. If they can resolve it between each other or having Mason there, I mean, that is even better. There is no reason for us to have to pass a bill when there is already a mechanism to resolve the situation which is a private nuisance lawsuit. I have this thing written up about private nuisance lawsuits. I will just read it real quick. "A private nuisance lawsuit occurs whenever someone prevents or disturbs your use of enjoyment of your property." That is exactly what is going on. "To successfully sue someone for causing a private nuisance lawsuit, you must prove that: you own, rent, or lease the property and the defendant created or maintained a condition that was harmful to your health, indecent or offensive, or obstructed your free use of your property" which would be the smoke bothering the MacDonalds, "...you did not consent to the person's conduct. The person's conduct interfered with your use or enjoyment of your property, the conduct would be reasonably annoying or disturbing to an ordinary person." Now these are things for the private nuisance lawsuit which is a simpler means of resolving this thing than us going and doing a new law which Police said they have a hard time enforcing and Fire said they have a hard time enforcing. For me, it is big. What is the true issue? The true issue is Department of Health came out, we had seventy-three (73) complaints in one (1) year and seventy-two (72) was from one (1) particular chimney. I think that is issue that we need to resolve. There are other means to resolve that issue which is a private nuisance lawsuit or them being able to work it out by themselves. I do not think we need to be here making another law. Hat is just going to hinder the process or give false hope. I am going to have a hard time supporting it if it goes to full Council.

Committee Chair Hooser: Okay. Out of deference to the non-Committee members, I thought earlier that I said has everybody spoken so I was going to speak last. I appreciate the opportunity to speak just to clarify the intent of the Chair anyway, is not to pass the law. I mean, you both argued that we should not pass a law, we should not pass a law, we should not pass a law. My intent is to...I agree with you. We are not ready to pass this law. I will yield the floor to Councilmember Yukimura and hopefully we can close this conversation. Thank you.

Councilmember Yukimura: Thank you. I just want to say that if a private nuisance lawsuit is so easy, a deferral will allow that to be tried, but you never know. If it does not succeed, then we may know that we need a public law but also in the works is an effort by Councilmember Chock. So, I think a deferral is very appropriate.

Councilmember Yukimura moved to defer Bill No. 2573, Draft 1 as amended to Bill No. 2573, Draft 2 pending Committee Chair Hooser's request to place the item back on the agenda, seconded by Councilmember Chock, and carried by a vote of 3:1:1 (*Councilmember Kagawa voting no; Councilmember Kualii was excused*).

Committee Chair Hooser: The ayes have it, 3:1. This concludes the Committee on Public Safety.

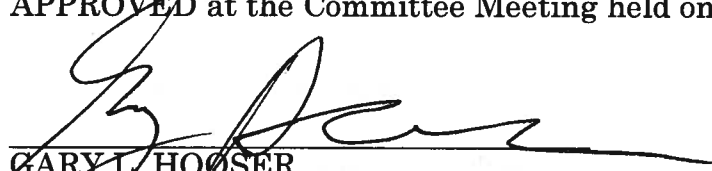
There being no further business, the meeting was adjourned at 4:15 p.m.

Respectfully submitted,



Allison S. Arakaki
Council Services Assistant I

APPROVED at the Committee Meeting held on April 15, 2015:


GARY L. HOOSER
Chair, Public Safety Committee

(March 4, 2015)

FLOOR AMENDMENT

Bill No. 2573, Draft 1, Relating to Declaring a Public Nuisance

Introduced by: JOANN A. YUKIMURA

1. Amend Bill No. 2573, Draft 1 by amending the proposed Section 22-___.1 as follows:

"Sec. 22-___.1 Prohibited Acts—Nuisance.

(a) It is declared to be a public nuisance and unlawful for any person, firm, or corporation in the County of Kaua'i, within or upon any property residentially zoned R-4 or higher density, to intentionally, knowingly, or recklessly cause, permit, or allow to escape into the open air, smoke, soot, or poisonous gases of any kind from any smokestack, chimney, or flue, originating from within the residence, under the person's, firm's, or corporation's charge or control, [in such a manner or in such a place as to cause injury to the health of any person. Prior to issuance of any citation, the complaining witness must first provide an affidavit detailing the incident at issue and identifying the source property located within the designated area, which must be accompanied by an affidavit from the person's physician detailing any negative impact to the person's health that is occurring due to the smoke, soot, or poisonous gases.] during any period in which the State Director of Health has declared a "no-burn" period, pursuant to Title 11, Chapter 60.1, Hawai'i Administrative Rules.

(b) This Article shall apply only to [fireplace burning] fireplaces or other smoke-generating indoor heating devices within residences, and shall not apply to other[:] cooking activities and other traditional and customary practices, including but not limited to use of imu, hibachi, or preparation of "smoke meat"; agricultural operations; religious activities, including but not limited to the burning of incense; or any activity that has been explicitly allowed by the State of Hawai'i Department of Health, State of Hawai'i Department of Agriculture, or other applicable State or Federal entity."

(Material to be deleted is bracketed. New material to be added is underscored.)

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(b) This Article shall apply only to fireplace burning within residences, even when used for cooking, and shall not apply to other[:] cooking activities and other traditional and customary practices, including but not limited to use of imu, hibachi, or preparation of "smoke meat"; agricultural operations; religious activities, including but not limited to the burning of incense; or any activity that has been explicitly allowed by the State of Hawai'i Department of Health, State of Hawai'i Department of Agriculture, or other applicable State or Federal entity."

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